JD–57–08
Toledo, OH

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

FAURECIA EXHAUST SYSTEMS, INC.

and

Cases 8–CA–37192
8–CA–37229
8–CA–37354

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, REGION 2-B

Rudra Choudhury, Esq.,
for the General Counsel.
Michael A. Snapper and *Keith J. Brodie, Esqs.,*
(Barnes & Thornburg LLP), of Grand Rapids,
Michigan, for the Respondent.

SUPPLEMENTAL DECISION

Statement of the Case

IRA SANDRON, Administrative Law Judge. I issued a decision in this matter on April 2, 2008. In 353 NLRB No. 34 (2008), the Board remanded the case to me regarding Marvin Blue's May 11, 2007 suspension and May 16, 2007 written warning,[1] which I found violated Section 8(a)(3) and (1) of the Act. The Board determined that my analysis regarding the General Counsel's satisfaction of his initial burden under *Wright Line*[2] was clear, but my *Wright Line* analysis in rejecting Respondent's rebuttal defense was not ("Specifically, we cannot discern whether it is based on a dual-motivation analysis or a pretext finding." Ibid, slip op. at 4). Thus, the Board remanded the case for the following sole and limited purpose:

> [T]he judge should explain which analytical framework under *Wright Line* he meant to apply [as to the second prong of *Wright Line*], reanalyze the 8(a)(3) allegation under that analysis, and specify the evidence relied on in reaching that conclusion.

I will address only aspects of the case pertinent to the remand.

Credibility

Respondent did not elicit testimony from any individuals whom Blue allegedly "harassed" by asking them to obtain employee information for the Union. Notably, one of those persons was gap leader Jennifer Samples, whom Respondent called as a witness. She testified about other matters but was asked no questions on this subject. Although I concluded that Samples was not a statutory supervisor, she had firsthand knowledge of the incidents on which Respondent based the imposition of discipline on Blue, and she would have been reasonably

[1] All dates hereinafter occurred in 2007, unless otherwise specified.

[2] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

expected to testify for Respondent about them. Her failure to do so raised the suspicion that her testimony would have been unfavorable to Respondent, and I therefore drew an adverse inference against Respondent on this issue. See *Palagonia Bakery Co.*, 339 NLRB 515, 538 (2003); *Dalikichi Sushi*, 335 NLRB 622, 622 (2001); *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. mem 861 F.3d 730 (6th Cir. 1988).

Blue was generally credible and consistent, and I credited his unrebutted testimony regarding the scope and nature of his activities.

Facts

When Blue worked for a previous employer, he served as a shop steward for the Charging Party-Union (the Union). He has been a welder for Respondent since June 2006, with Production Supervisor Jeff Lovejoy his immediate supervisor at all times. In about October or November 2006, the Union contacted Blue about organizing Respondent's employees, and at around that time, he first talked to coworkers on the subject.

The facts set out in the following two paragraphs are based on Blue's unrebutted and credible testimony.

In early 2007, Blue had a conversation in the parking lot with Samples and welder Eric Taylor, prior to the beginning of the shift. Blue stated that he sometimes thought the employees needed a union. Samples replied that if Site Manager Jack Caccioppo heard him talk about unions, he could get terminated.

In early April, the Union asked Blue to obtain employees' names and phone numbers. Later that month, Blue asked "Meechy," the night-shift gap leader (whom Respondent no longer employs), if he could get such information for Blue to pass on to the Union. Meechy said that he would try. On or about May 9, Blue, in a telephone conversation, made the same request to Samples, who also replied that she would try. He testified that he asked them because he trusted them and believed they had access to the information; to wit, in the regular course of their duties as gap leaders, they spent time in the supervisors' office.

On the morning of May 11, at the conclusion of his morning break, Blue was called to a meeting in the conference room with Caccioppo, Lovejoy, and quality engineer Bryan Kennedy. Caccioppo stated that Blue was suspended until further notice, for violating company policy by harassing people for names and phone numbers. Caccioppo gave no specifics, and Blue denied any wrongdoing.

On the morning of May 16, Lovejoy called Blue and told him to come to a meeting in the conference room that afternoon. Blue did so. Present were Caccioppo and Lovejoy, with Human Resources (HR) Manager John Plenzler participating by conference call.

Plenzler read Blue verbatim the contents of General Counsel's Exhibit 14, a memo dated May 16, 2007, from Plenzler to Blue, and signed by Plenzler and Caccioppo. The memo states that management had received complaints regarding Blue's behavior and the requests he made of other employees for employee lists and phone numbers. The matter was fully investigated and the determination made that Blue had violated the following provisions of the handbook when he "persistently and improperly pressured a number of other employees to provide . . . lists of employee names and phone numbers": Section 1.2–harassment/sexual harassment, and Section 1.3–productive work environment.

Relevant portions of those sections are:

1.2–Harassment/Sexual Harassment; the opening paragraph states that the Company "has established a strict policy prohibiting unlawful harassment (racial, national origin, color, disability, religious, age, sexual, sexual orientation) of employees, including implied or expressed forms of sexual harassment. . . ."

1.3–Production Work Environment Policy; in particular, "Any behavior that causes an intimidating, threatening or unsafe environment is unacceptable. Examples of unacceptable behavior may include the use of profanity, gossip, and/or the spreading of rumors, physical intimidation, creation of unsafe conditions and mental harassment."

Plenzler further stated that Blue's "attempts to obtain employee phone numbers was an attempt to violate Section 1.10 of the handbook, which protects the confidentiality of employee records. You have no right to such information from company records, and your actions threatened the privacy of your fellow employees as well as company policy."

Section 1.10 relates to personnel records. The relevant paragraph states, "Your personnel record is considered confidential. Other than verification of employment, personnel information will not be released to outside parties without your permission. . . ."

Plenzler warned Blue that any further violation of those policies would subject him to discipline up to and including termination, asked him to sign the memo, and stated he would have his job back. Blue signed it. I credit Blue's unrebutted testimony that he then said he wanted it on record that he supported the Union and knew his rights, and Plenzler acknowledged there was "activity" in December 2006 and January, of which Blue was part. Plenzler told Blue that he could return to work the following day and would be paid for the time he was suspended. Blue lost no pay or other benefits as a result of the suspension.

The parties stipulated that General Counsel's Exhibit 18 is comprised of the only documents that Respondent furnished in response to the following portion of the General Counsel's subpoena duces tecum: all employees at the facility who were disciplined for harassment and/or sexual harassment during the period from July 26, 2005–July 26, 2007.

Those documents show that only one employee other than Blue has been disciplined for such reason: Matt Kirshner, who in October 2006 received a 1-day suspension for making racist remarks to other employees. Respondent provided no documentation that it has disciplined anyone other than Blue for misconduct pertaining to the work environment or confidentiality of employee records.

The parties stipulated that management knew of Blue's union activities beginning on about December 13, 2006. An e-mail of that date from HR Manager Plenzler referred to Blue's "persistence" in talking to other employees about the Union, and reflected management's concern over this.[3]

Soon afterward, Plenzler, by e-mail dated December 19, 2006, directed supervisors to investigate the "complaints" against Blue.[4] In that e-mail, he also stated that "I would like to

[3] See GC Exh. 5 at 1. See also GC Exh. 6.

[4] GC Exh. 7.

finalize a date to meet with the workforce regarding our Union Free Policy as this is heating up quickly."

On May 3, 2007, just 8 days before Blue's suspension, Plenzler sent an e-mail to Caccioppo entitled "Union Activity," in which he discussed reports of (unnamed) employees soliciting support for the Union and expressed his opinion that "the union is coming after us in strength."[5]

In an e-mail dated May 15, 2007, after Blue's suspension, Caccioppo advised Plenzler that regarding the third shift, Blue had been "very pro-Union in his discussions and comments all the time" with one employee but had not asked him for any information.[6]

Finally, Supervisor Eric Plenzler, in an e-mail dated July 27, 2007, to Supervisors Lovejoy and Tonia Carter, stated that a change in labeling employee lockers "may not be a good idea with all of the union stuff going on. Marv [Blue] has already been disciplined for trying to get the names of all of the hourly people, why should we make it easier for him to obtain this information?"[7]

Analysis and Conclusions

The framework for analyzing alleged violations of Section 8(a)(3) is *Wright Line.* Under *Wright Line*, the General Counsel must make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated an employer's adverse action. The General Counsel must show, either by direct or circumstantial evidence, that the employee engaged in protected conduct, the employer knew or suspected the employee engaged in such conduct, the employer harbored animus, and the employer took action because of this animus. The Board did not take issue with my analysis in concluding that the General Counsel established a prima facie case, and I will not repeat it here.

Under *Wright Line*, if the General Counsel establishes a prima facie case of discriminatory conduct, it meets its initial burden to persuade, by a preponderance of the evidence, that protected activity was a motivating factor in the employer's action. The burden of persuasion then shifts to the employer to show that it would have taken the same adverse action even in absence of such activity. *NLRB v. Transportation Corp.*, 462 U.S. 393, 399−403 (1983); *Kamtech, Inc. v. NLRB*, 314 F.3d 800, 811 (6th Cir. 2002); *SPO Good-Nite Inn, LLC,* 352 NLRB No. 42, slip op. at 2 (2008); *Serrano Painting*, 332 NLRB 1363, 1366 (2000).

As the Board stated in its remand, if the employer's proffered defenses are found to be a pretext, i.e., the reasons given for the employer's actions are either false or not in fact relied on, the employer fails by definition to show that it would have taken the same action for those reasons, and there is no need to perform the second part of the *Wright Line* analysis. *SPO Good-Nite Inn, LLC,* supra. On the other hand, further analysis is required if the defense is one of "dual motivation," i.e., the employer defends that, even if an invalid reason might have played some part in the employer's motivation, the employer would have taken the same action against the employee for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 323, 223 (D.C. Cir. 2006).

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[5] GC Exh. 8.
[6] GC Exh. 9.
[7] GC Exh. 13 at 2.

For the following reasons, I conclude that Respondent's defenses were a pretext and fail on that basis.

A series of internal company e-mails going back as far as December 2006 demonstrate Respondent's ongoing hostility toward Blue for his solicitation of coworkers to support the Union, as well as surveillance of his union activities.

Respondent failed to offer any direct evidence in the way of testimony from purported complainants, even one who testified at the trial on other matters. Respondent therefore failed to rebut Blue's credited testimony that he merely asked two gap leaders for employees' names and phone numbers with the avowed purpose of passing the information on to the Union—conduct which can hardly be deemed to amount to "harassment" under any reasonable construction of the term.

Respondent's harassment/sexual harassment policy addresses "unlawful harassment (racial, national origin, color, disability, religious, age, sexual, sexual orientation) of employees, including implied or expressed forms of sexual harassment. . . ." Blue's conduct did not fit within any of these categories. Thus, during the 2-year period from July 26, 2005–July 26, 2007, Respondent disciplined only one other employee for violating its harassment/ sexual harassment policy, and that was for making racist remarks. The record further reflects that no employee other than Blue has been disciplined for breaching either Respondent's confidentiality or work environment policies.

Respondent issued Blue a suspension without providing him the specifics of the allegations against him or affording him an opportunity to respond. This leads to the conclusion that management was not genuinely interested in what actually happened but was instead using alleged violations of company policy as a pretext. See *Diamond Electrical Mfg. Corp.*, 346 NLRB 857, 861 (2006); *Joseph Chevrolet, Inc.*, 343 NLRB 7, 8 (2004), enfd. mem. 162 Fed. App. 541 (6th Cir. 2006). The written warning that followed the suspension must be considered part of the same chain of events and, by analogy to the "fruit of the poisoned tree" principle, was also tainted.

Accordingly, I conclude that Respondent would not have suspended Blue on May 11, or issued him a written warning on May 16, in the absence of his protected union activity, and that such adverse actions therefore violated Section 8(a)(3) and (1) of the Act.

ORDER

The Respondent, Faurecia Exhaust Systems, Inc., Toledo, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing warnings to, suspending, or otherwise disciplining employees because they engage in activities on behalf of International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Region 2-B, or any other labor organization.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, remove from its files any references to the May 11, 2007 suspension, and the May 16, 2007 written warning, issued to Marvin Blue, and within 3 days thereafter, notify him in writing that this has been done and that the suspension and warning will not be used in any way against him.

(b) Within 14 days after service by the Region, post at its facility at Toledo, Ohio, copies of the attached notice marked "Appendix A."[8] Copies of the notice, on forms provided by the Regional Director for Region 8 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 11, 2007.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 8 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. October 30, 2008.

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Ira Sandron
Administrative Law Judge

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT issue you written warnings, suspend you, or otherwise discipline you because you engage in activities on behalf of International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Region 2-B, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the National Labor Relations Act, as set forth at the top of this notice.

WE WILL remove from our files any reference to the unlawful suspension and warning of Marvin Blue, and within 3 days thereafter notify him in writing that this has been done and that the suspension and warning will not be used against him in any way.

FAURECIA EXHAUST SYSTEMS, INC.

_____
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1240 East 9th Street, Federal Building, Room 1695
Cleveland, Ohio 44199-2086
Hours: 8:15 a.m. to 4:45 p.m.
216-522-3716.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S

COMPLIANCE OFFICER, 216-522-3723.